No. 2729

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ENNIS-BROWN COMPANY (a corporation),
Appellant and Complainant,

vs.

CENTRAL PACIFIC RAILWAY COMPANY (a corporation),
and SOUTHERN PACIFIC COMPANY (a corporation),
Appellees and Defendants.

APPELLANTS' REPLY BRIEF.

BURRELL G. WHITE,
Attorney and Solicitor
for Appellants and Complainants.

EDWARD ELLIOTT,
ROY S. BARTLETT,
Of Counsel.

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By.....Deputy Clerk.

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APPELLANTS' REPLY BRIEF.

I.

Appellants, in making as short as possible, this, their brief in reply to the two briefs of appellees, content themselves with relying upon their opening brief wherever possible.

II.

Appellants entertain no doubt but that the amended bills of complaint state facts sufficient to constitute valid causes of action in equity, nor have they any doubt as to the sufficiency of the authorities cited in their opening brief, pages 11 to 81, upon the question of

jurisdiction. They therefore rest in the main as to those matters upon their opening brief.

III.

It is said in Foster's Federal Practice, fifth edition, at page 1199, that

> "The provisions of the equity rules and other regulations of practice are chiefly designed to facilitate the speedy and orderly progress of a cause to a hearing."

The conduct of defendants with reference to the equity rules, resulting in unjustified delay in the pending suits, has caused certain collateral questions to be brought up on this appeal. Appellees at oral argument and in their briefs contest the right of appellants to bring up a record sufficient to show intermediate orders of the court below which appellants seek to have this court review.

> "Upon an appeal from the final order or decree every interlocutory order affecting the rights of the parties regarding the matters in question between them is subject to review in the appellate court and may be heard and decided at the same time."
>
> Western Union Telegraph Co. v. United States & M. T. Co., 221 Fed. 551.

> "An appeal in equity brings up all the matters which were decided in the Circuit Court to the prejudice of the appellant; including a prior decree of that court from which an appeal was dismissed under the rules of this court." (Head note.)
>
> Buckingham v. McLean, 13 How. 150; 14 L. ed. 90.

The Rules and Statutes provide that the whole record may be brought up: Equity Rule 75; C. C. A. Rule 14; S. C. Rule 8; Secs. 698, 750 Rev. Sts.

IV.

Appellants especially request the court to consider, as showing the foundation of Equity Rule 32, the authorities cited and the reasoning given in pages 81 to 111 of their opening brief. Therefrom it will be concluded that Equity Rule 32, as might be expected from any rule adopted by the United States Supreme Court, has a most substantial basis and serves a most useful purpose in the full scheme of the New Equity Rules.

V.

It will be necessary to reply to certain matters more in detail.

Appellants do not contend that defendants may not object at any time to a complainant's failure to state facts sufficient to constitute a valid cause of action. As we understand the law, the court may at any time move of its own motion on the ground of insufficiency of facts stated to constitute any cause of action at all. If, however, a bill states facts sufficient to constitute any valid cause of action, diversity of citizenship being shown and it being competent for the court to grant the relief sought, it cannot be objected that such stated cause of action is not valid in equity, after the defendant

has waived all objection to jurisdiction in equity in the cause stated. Such is the status in the pending suits. The motion to dismiss is directed to the alleged insufficiency of facts to constitute a cause of action *in equity.* (See Tr. p. 23, I.)

Defendants (appellees) admit that the original bills state facts sufficient to constitute valid causes of action under the laws of California. In appellees' first brief it is stated, at page 2:

> "The original complaint was an action to quiet title and undoubtedly sufficient in form under the law of the State of California. In the original complaint there was no averment as to whether or not the complainant was or was not in possession, or that defendant Southern Pacific Company was or was not in possession."

Diversity of citizenship is alleged (Gillis v. Downey, appellants' opening brief page 30); it is competent for the court to grant the relief (Cobban v. Conklin, 208 Fed. 231, appellants' opening brief page 84).

The defendants answered without objection and under such circumstances (Tr. pp. 75-82 and 83) as to show a voluntary and intentional submission to jurisdiction in equity.

The grounds assigned for motions to dismiss show that the motions go to the allegation of possession in the amended bills which in fact was the only allegation added and the only change by amendment from the original bills at the time of making the motions to dismiss. The allegation can have no effect whatever upon the pleading, except as showing a remedy in an

action at law; and objection on that ground defendants had waived. It was open to defendants, at the time of filing their original answers, to object to jurisdiction on account of possession in the Southern Pacific Company; if defendants did not wish to waive objection on that ground, such action should have been taken *in limine* as was done in Union Pacific R. R. Co. v. Cunningham, 173 Fed. 91, which was by plea. Under the new rules, the objection, of course, should have been taken by corresponding motion or in the answer. No allegation as to possession could revive the right to object on that ground. The facts essential to the statement of cause of action remain the same in the amended as in the original bills. The objection on account of amendment is to the form and not to the substance of the cause of action stated. Nowhere is any ground set out for the motions to the effect that the bills, as amended, do not state sufficient facts to constitute any cause of action to quiet title; if the technical requirements of federal courts, proceeding independently of state statutes, as to possession, be eliminated, it is admitted that the amended bills state facts sufficient. It is solely upon such grounds as defendants might waive and had waived that the motion is made.

The opinion of the lower court (Tr. p. 27, last paragraph) states that the ground for motion is that the bill does not state facts sufficient to state a cause of action *cognizable in equity,* and goes on to specify that such is true *because of the showing as to possession.*

The first brief of appellees, pages 7 to 15, is devoted to an argument as to the insufficiency of the amended

bills because of the allegation as to possession. It is not claimed anywhere that the objection to the amended bills is directed to anything in the amended bills, except the allegation of possession. Upon argument and in their second brief appellees repeat the ground of objection as being to possession in the Southern Pacific Company, defendant.

In appellees' first brief the points relied upon are set out at pages 6 and 7. Point One states that

> "The complaint stated no cause of equitable cognizance because it appeared that complainant was out of possession and a defendant was in possession and occupation of the premises. The legal remedy is adequate."

If it be held that the amended bills of complaint (the word complaint used in the foregoing quotation evidently refers to the amended pleading of complainant) do not state facts sufficient in equity and that the objection upon the ground of the existence of a legal remedy was not waived, then Point Three, namely,

> "The complaint stated facts showing no cause of action in favor of complainant at law or in equity"

follows. The suits are brought under a statute and no effort was made to state a cause of action in damages. Yet the objection to complainants' pleading is not that the amended bills do not contain facts sufficient to state causes of action under the statute but simply that there is no jurisdiction in equity and is not the objection which is ordinarily had in mind when parties object that a bill does not state facts sufficient to constitute any cause of action at all, for it is conceded that the amended bills of complaint do state matters sufficient

in substance to charge the defendants with a breach of law.

In Jacob v. United States, 13 Fed. Cases No. 7157, it is said:

> "It is defect of form whenever the defendant must of necessity be guilty of a breach of law and have incurred the penalty for which the suit was brought if the allegation of the declaration be true. This constitutes the difference between form and substance."

As stated before, an allegation of possession was the sole allegation added in the amended bill, and consequently the only subject of objection. Defendants, however, eliminate, by reason of the allegation as to possession, admitted good statements of causes of action to quiet title, and then say that no cause of action is stated at all, since the amended bills show complainants have a remedy in an action for damages, and fail to state sufficient facts for that cause of action. They bring appellants to the defective statement of any cause of action only by eliminating a statement of cause to quiet the title, admittedly good except for the existence of a legal remedy in damages, an objection which defendants could not have urged at that time, even if it had existed.

Everywhere, in the motion to dismiss, in the opinion of the lower court, in the briefs of appellees and in the oral argument it is shown clearly that the primary objection is directed alone to the presence of the allegation of possession in the Southern Pacific Company, and the consequent legal remedy.

The allegation of possession in the defendant, Southern Pacific Company, was in the answer of defendants already filed and most conclusively was within the knowledge of defendants and could have been made a ground of objection when defendants answered originally (Rule 29). As soon as complainants inserted the allegation in their pleading, the defendants moved to dismiss, because they say (Tr. p. 24, motion to dismiss) the amended bills show that

> "if the said plaintiff has any remedy at all, it is in an action at law for damages."

See

Hoogendoon v. Daniel, 178 Fed. 767.

Defendants had already waived their right to object, if any they ever had, on the ground that the amended bill did not state facts sufficient to constitute a valid cause of action in equity because of the existence of a remedy in an action at law. There was but the one suit (or set of several suits) and in it (and in each of them) the objection to proceeding in equity to quiet the title had been waived and that waiver, as we understand the law, extends throughout the life of the proceeding. If a defendant moves to dismiss (demurs) upon a special ground and the motion is denied and time given within which to answer, the defendant may not thereupon demur generally instead of answering. Likewise, if a defendant by conduct or otherwise waives his right to object to jurisdiction in equity, it being competent for the Court to grant the relief prayed, and he is granted (Rule 32) time within which to answer, he may not refuse to answer and move to dismiss gen-

erally without being in default, if the bill states a good cause of action. Such, according to our view, has always been the rule; with particular reference to the new equity rules, it is said in Boyd v. N. Y. & H. R. Co., 220 Fed. 178:

> "One, who demurs generally nowadays, must be understood to do so not only on what complainant shows but also after having his own conscience purged. Thus only is avoided the old and bad habit of trying everything else before stating facts."

If our interpretation of the new rules be correct, the record in the pending cases shows a most flagrant disregard of them and the course of the pending suits in the lower court shows no improvement over conditions which existed prior to the new rules. By this statement, however, we do not mean that the successive steps taken by defendants find approval in good practice prevailing before the adoption of the new rules. New Equity Rule 32 is a practical readoption of former Rule 46. The United States Supreme Court in its revision of the Equity Rules in 1912 no doubt considered the need of Rule 32, else it would not have been readopted. The purpose of the Equity Rules is declared in the decisions and in the text books generally to be in aid of the speedy determination of causes.

If defendants may receive the advantages of opposition to compliance with the new rules with impunity, what protection have complainants generally and these appellants particularly against such unjust delay and studied disregard of rights given by the rules as the record here discloses appellants to have suffered? If

defendants may be permitted to go back to the lower court to begin the pending suits at a point where the suits were practically two years ago, then what is to deter defendants, in position of advantage with respect to property, from pursuing such a course as defendants have followed in order that further delay may result while defendants are enjoying the benefit of their possession?

VI.

If there is not, by reason of their allegations, jurisdiction in equity over the amended bills of complaint, the suits were, of course, properly dismissed, provided the defendants had not waived their right to object to jurisdiction in equity; but if the suits were properly being prosecuted in equity, then the decrees of dismissal were erroneous and no order of the court below could operate to revive the right in defendants to file a new or supplemental answer, made after the time provided by Rule 32 within which such new or supplemental answer should be filed, and no order attempting to excuse the defendants from filing a new or supplemental answer has any effect if made subsequent to the time that defendants came into default. Where Rule 32 provides that a new or supplemental answer shall be filed within ten days after the filing of the amended bill unless it is otherwise ordered, an order, if made, extending the time, directing the original answer to stand, or otherwise providing, must be made within the time given to answer. Such is the law in all jurisdictions.

VII.

The lower court made no order of dismissal until the 20th day of December, 1915. The record discloses that on December 1st, the court granted a motion to dismiss (Tr. p. 40), but, so far from ordering the suits dismissed, the court gave the complainants time within which to amend, and as late as December 20th exercised jurisdiction in the proceedings as to many matters, and thereafter on December 20th ordered the suits dismissed. The mind of the court, as gathered from the successive steps taken in the suits after the granting of the motion to dismiss, shows clearly that the suits were not intended to be dismissed and were not dismissed until December 20, 1915, five days subsequent to the entry of the orders for decrees *pro confesso*. An opinion, even an order for a decree, is not a dismissal of the action, as is shown by the following authorities:

The decree of dismissal in the pending suits, made December 20, 1915, used the following language:

> "It is ordered * * * that * * * the cause be, and the same is hereby dismissed."

In Providence Rubber Co. v. Goodyear, 6 Wall. 153, 18 L. ed. 762, on November 28, 1866, an order was entered on the minutes of the court confirming the master's report, that the exceptions "be and the same are hereby overruled"; fixing the amount of profits made by defendant in violation of plaintiff's rights and concluding

> "that the complainants do recover of respondents in this case the sum of $310,757.72, and costs, taxed at....."

Afterwards, on December 5, 1866, two days after the commencement of the December Term, a final decree, for the most part, in identical language, of the order of November 28th, was filed and entered.

The decree was "entered as of November 28, 1866."

The Supreme Court said:

> "This decree, it is seen, is for the most part in the very language of the order, but uses the introductory words appropriate to a decree, and describes particularly the patents in controversy, and ascertains the amount of costs taxed. It omits the explanatory directions of the order as to the bond to be given on appeal; but the entry of the decree is followed immediately by another entry stating that an appeal was prayed for by respondents in open court, and was allowed, upon filing a bond within ten days, with sureties, to the satisfaction of the district judge.
>
> Upon these facts we cannot doubt that the entry of the 28th of November was intended as an order settling the terms of the decree to be entered thereafter; and that the entry made on the 5th of December was regarded both by the court and the counsel as the final decree in the cause.
>
> We do not question that the first entry had all the essential elements of a final decree, and if it had been followed by no other action of the court, might very properly have been treated as such. But we must be governed by the obvious intent of the circuit court, apparent on the face of the proceedings. We must hold, therefore, the decree of the 5th of December to be the final decree.
>
> It appears to have been entered 'as of the 28th of November.' But this circumstance did not affect the rights of parties in respect to appeal. Those rights are determined by the date of the actual entry, or of the signing and filing of the final decree. That test ascertains for the purpose of

> appeal, the time of rendering the decree, as the 5th of December, 1866. The appeal in this case, therefore, was rightly taken to the present term."

In United States v. Gomez, 17 L. ed. 677, 679, it is held that time in which appeal may be taken does not begin to run from the date of filing of opinion of the court in which it is ordered that a decree be entered up in conformity to such opinion, but from the date of the signing and entering of the decree itself.

This was a petition for the confirmation of a land claim and the case came before the Supreme Court upon motion of the appellee to dismiss the appeal.

Opinion of the lower court confirming the claim was delivered on June 5, 1857, more than five years before the appeal was taken, the entry being that a decree was ordered to be entered in conformity with such opinion. No decree of any kind, however, was drawn up, entered or filed on that day.

On January 7, 1858, a decree was filed in the case, and the decree, after referring to the fact that the claim had been confirmed on June 5, 1857, stated that

> "having been omitted to sign and enter a decree therefor at the date last aforesaid, it is ordered that the same be done now for then."

The court said:

> "Plainly there was no decree of any kind in this case until the 7th of January, 1858 * * *."

The suits were not dismissed until an appealable order or decree was made and entered.

Notley v. Brown, 208 U. S. 429; 52 L. ed. 559.

A "judgment" is a final determination of the rights of the parties to an action; while every direction of the court made or entered in writing but not included in the judgment is denominated an "order".

Sellers v. Union Lumber Co., 36 Wis. 398.

Lower court ordered that unless an appeal be taken, etc., a summary judgment therefor be entered, etc. Appeal was taken, and the Supreme Court, speaking through Chief Justice Waite said:

> "It is true that if appeal had not been taken the requisite decree (judgment) might have been obtained; but it is equally true that until a decree is actually entered the Court retains the power to withhold it."

Ex parte Sawyer, 22 L. ed. 618.

> "The direction to enter a judgment in the judgment book is mandatory because it imposes a public duty upon a ministerial officer. In a proper case, if the clerk's fee is paid, he will, on motion either of the plaintiff or defendant, be compelled by the Superior Court to enter a judgment of dismissal or nonsuit. * * * *But until the judgment is entered, the action is not dismissed.*"

Page v. Superior Court, 76 Cal. 373-4.

A "judgment" is the final consideration and determination of the court * * * and it is only evidenced by a record. * * * An *order* for a *judgment* is *not* the judgment, nor does the entry of such order partake of the nature and quality of a judgment of record.

Whitwell v. Emery, 3 Mich. 84, 88; 59 Am. Dec. 220.

The clerk must keep an "Equity Journal in which shall be entered all orders, decrees and proceedings of the court in equity causes in term time."

> "Fact that a judge had expressed a willingness to make a desired order, when no such order was actually made, does not warrant the entry of such an order."
>
> Klein v. S. P. Co., 140 Fed. 213.

A dismissal is an appealable order or decree and as soon as a suit is dismissed the complainant has his right of appeal and of course that right is well known to run from date of entry of judgment or decree. Nor is the suit dismissed until an appealable decree is made and entered.

> Fowler v. Homill, 139 U. S. 549; 35 L. ed. 266;
> Notley v. Brown, 208 U. S. 429; 53 L. ed. 559.

It has been held that the following orders and decrees in equity are not final and cannot be reviewed by appeal. An order setting aside a final decree is not appealable where the appellant has obtained leave to amend.

> Fisher v. Simon, 67 Fed. 387.

It must clearly appear that appellant has refused to comply with the conditions before appealable.

> Herrick v. Cutcheon, C. C. A., 22 Fed. 6.

A statement on the records of the court:

> "A confirmed report, at best, stands in the same relation to a decree as a verdict to a judgment. It may be almost certain that the decree will follow it, but it cannot be enforced until the decree is entered."
>
> Scath & Co. v. Wilson (C. C. A.), 115 Fed. 284.

There was no order or decree in the cases until December 20th, from which an appeal might have been taken as the cases stood. An order of dismissal is appealable.

> "A decision containing directions for a decree is not considered as a decree."
> U. S. v. Gomez, 17 L. ed. 677;
> Re McCall (C. C. A.), 145 Fed. 898;
> Works v. Pac. Ry. Co., 76 Fed. 941.

It has even been held that the clerk may refuse to enter a decree until his fees are paid; and that although left in the clerk's office, it is not effective.

> Owmen v. Talcott, 180 Fed. 925.

Appellees are not very specific in pointing out how the court had jurisdiction for the purpose of setting aside decrees *pro confesso* on December 20th and at the same time lacked jurisdiction to order the consolidation of the sixteen suits. At page 42, their first brief, appellees refer to an order for dismissal as avoiding the effect of a consolidation and at page 32 they refer to an order of dismissal as preventing the entry of the decrees *pro confesso;* yet when it comes to the court making an order setting aside the decrees *pro confesso* on December 20th, the alleged order of dismissal seems to lose its potency and to in no way affect adversely the order of the court setting aside the orders for decrees.

The fact is, there was no order of dismissal and the suits were not dismissed until after each and all of the several orders and proceedings herein referred to were taken and had, and upon such a theory alone

can the many steps taken in the suits by both sides and by the court between December 1st and December 20, 1915, be accounted for.

Even if the orders for decrees pro confesso were not regularly entered by reason of action of the court on December 1, 1915, the application of complainants for orders for decrees pro confesso are yet pending and are the subject of proper order by this court, if the decrees of dismissal were erroneous.

VII.

A MERE REVERSAL OF THE DECREES OF DISMISSAL WILL NOT SATISFY THE DEMANDS OF JUSTICE IN THE PENDING SUITS AND FOR THAT REASON APPELLANTS INSIST THAT IF DEFENDANTS WERE OR ARE IN DEFAULT COMPLAINANTS ARE ENTITLED TO FINAL DECREES AS TO THE WHOLE BILLS AS AMENDED (see appellants' opening brief, p. 119).

Soon after the practice of taking bills as confessed, without requiring proof, was first adopted in the Chancery courts of England, Lord King overruled a decision of the master of the rolls, which allowed the whole bill to be taken as confessed for want of a further answer.

Hawkins v. Crook, 2 Peere Wms. 559.

However, a few months later, he in effect overruled his own decision in that case in Abergavenny v. Abergavenny, 2 Eq. Ca. Abr. 179; 4 Vin. Abr. 446, S. C.

In Davis v. Davis (2 Atk. 23), which was decided in the year 1739, the Chancellor likewise refused to be

bound by the decision in Hawkins v. Crook; and, in the subsequent case of Turner v. Turner (1 Dick. 316), he in effect, though not in terms, overruled the case of Hawkins v. Crook.

In 1772 the same question came before Lord Apsley in the case of Bacon v. Griffith (S. C. 2 Dick. 473). Here the master of the rolls had allowed the amendments to the bill alone to be taken as confessed, the defendant having answered the original bill before amendment, and Lord Apsley reversed the order upon appeal, his lordship being of opinion that, the original bill being amended, it was one record; and, the amendments not being answered, the record was not answered; and that the application should have been for the plaintiff's clerk in court to attend with the record of the bill in order to have the same taken *pro confesso* generally.

A similar decision was made by Lord Alvanley in the year 1799 (Jopling v. Stewart, 4 Ves. Jr. 619).

Subsequently, the master of the rolls, in a case presenting the same question similarly decided a case arising in Ireland—O'Grady v. Barry, Drury's Digest for 1839, page 80.

Thus, it will be noted, that, beginning with the earliest practice, it has been uniformly held in England that the original and amended bills constitute but one record, and that, the amendment not being answered, the record is not answered and may be taken *pro confesso* generally; that is, to the whole bill.

The case of O'Grady v. Barry, having been decided in the year 1839, brings us practically down to the date

of the adoption of Equity Rule 46 of the rules of 1842, and, from a reading of that rule, it is plain to be seen that the Supreme Court intended to adopt the practice as it then existed in England.

Equity Rule 46 provided:

> "In every case where an amendment shall be made after answer filed, the defendant shall put in a new or supplemental answer on or before the next succeeding rule day after that on which the amendment or amended bill is filed, unless the time is enlarged or it is otherwise ordered by a judge of the court; and upon his default the like proceedings may be had as in cases of an omission to put in an answer",

and Rule 32 of the present rules is a substantial re-enactment of Rule 46, being as follows:

> "In every case where an amendment to the bill shall be made after answer filed, the defendant shall put in a new or supplemental answer within ten days after that on which the amendment or amended bill is filed, unless the time is enlarged or it is otherwise ordered by a judge of the court; and upon a default, the like proceedings may be had as in case of an omission to put in an answer."

So the rule is stated by Mr. Daniell in his work on Chancery Practice (1 Daniell Ch. Pr. 402):

> "* * * although it is the practice to call a bill thus altered an amended bill, the amendment is in fact esteemed but a continuation of the original bill, and as forming a part of it, for both the original and amended bill constitute but one record; so much so that where an original bill is fully answered and amendments are afterwards made, to which the defendant does not answer, the whole record may be taken *pro confesso* generally, and an order to take the bill *pro confesso* as to the amendments only will be irregular."

State practice requires that in order to have an answer to the original bill stand as an answer to the amended bill an order of court to that effect must be obtained, otherwise, defendant is in default upon the expiration of the time within which defendant is required to answer the amended bill.

Rule 46 (quoted above) has been construed in conformity with the English practice by the federal courts, the language above from Daniell being incorporated in the opinion of the court in Excelsior Pebble Phosphate Co. v. Brown, 74 Fed. 323, quoted in our opening brief at page 119.

See also French v. Hay, 22 Wall. 246 (22 L. ed. 856).

The following is the interpretation given by Ruling Case Law by a *direct reference* to present Equity Rule 32:

> "If an amended bill is filed after the original bill has been answered, a *pro confesso* may be taken against the defendant, if he fails to answer the amended bill within the time prescribed by rule or statute unless the time is enlarged (U. S. Eq. Rule 32."
>
> 10 Ruling Case Law 537, Sec. 320.

No application for relief from the orders for decrees *pro confesso* was made upon any ground of fact. An application to set the same aside upon the ground that the defendants were not in default was made and granted. If the defendants were in default, the orders vacating the decrees *pro confesso* were erroneous.

Defendants (appellees) did not come offering to do the thing they neglected to do which placed them in

default. There was no offer to answer. They stood very flatly upon their not being in default and asked for no relief at all except upon the ground of our alleged error.

In order to warrant the court in granting the motions to set aside the orders for decrees *pro confesso* the defendants must have shown the existence of the facts upon which the motions are based; that is, that defendants were not in default.

The question involved is purely legal. The complainants had leave to amend in the lower court. They chose to stand upon their bills as amended, claiming that in point of law they had the right to do so. The defendants had an opportunity to file an answer or a supplemental answer to the amended bills. They contended that the bills as amended did not state causes of action in equity and that they had not waived the right to object to proceeding in equity. They elected not to answer the amended bills, but chose to stand upon motions to dismiss, claiming that in point of law they had a right to do so. If the lower court should be affirmed by this court the complainants shall not ask leave to amend for they well know that such an application would be denied. They elected their course in law and they are bound to stand the consequences of that election. Likewise the defendants have elected their course and should be held to abide the consequences of their election.

VII.

The two briefs filed by appellees are devoted:

First.

To a discussion against jurisdiction which takes appellees to the conclusion that

> "It is not necessarily true that there must be an equitable remedy because there is none at law."
>
> First brief page 16.

Second.

To an analysis and classification, of all cases cited by appellants, into the four heads, suggested in first brief and set out at page 14, appellees' second brief. Counsel's classification is an accomplishment which no judge or text writer has heretofore ever undertaken and is a shining example of counsel's facility, as evidenced throughout appellees' briefs. Efforts heretofore to so classify suits quieting title have failed. As was said in Continental Trust Co. v. Tallassee Falls Manufacturing Co., 222 Fed. 694:

> "Of course, the courts have never undertaken to state all the instances where one out of possession can sustain a bill to quiet title. It would be impossible to do this, for the reason that each case must rest upon its own peculiar variety of facts and circumstances."

While appellants would not detract from counsel's worthy effort, they feel obliged to meekly suggest that the class of cases shown in United States v. Leslie, 167 Fed. 672, be included in the classification.

Third.

Finding Rule 32 in the path of their reasoning, appellees present other novel propositions of law and construction of the rules generally, but particularly of Rule 32, as shown at page 28, first brief, where it is said:

> "By terms of new Equity Rule 32 they had ten days to put in a new or supplemental answer after amendment of the bill. This was done by moving to dismiss,"

and at page 30, where it is said that the motion to dismiss can be deemed an amendment to the answer to the original bill, and again at pages 34 and 41 respectively,

> "The motion itself is an answer"
>
> "Since the answer now also includes demurrer, the motion is an answer, because things equal to the same thing are equal to each other."

Appellants are tempted to divide appellees' briefs, as *ancient* Gaul was divided, into three parts, as enumerated, and submit them, for they dislike to enter, in this court, upon a criticism of an argument which leads to such groundless conclusions, but appellants are before this court upon matters of extreme importance, both in law and in fact. Their contentions were overruled by the lower court from beginning to end and they wish to do every reasonable thing here in order that this court may fully understand the whole situation and in order that, if their appeals be not sustained, it may not be through neglect to fully apprise the court of appellants' contentions.

It is said at page 6 (appellees' first brief) that

> "An additional brief, fully answering and analyzing the points and authorities of the appellant will follow."

In appellees' second brief, page 1, it is said

> "There seems after fuller reading, to be little which needs to be added."

The second brief, is, in the main, repetition.

Appellants cite and rely upon New Jersey, etc. v. Gardner-Lacy Lbr. Co., 178 Fed. 772 cited in appellees' second brief, top of page 3. Appellants fail to see how appellees can find any comfort in that case notwithstanding it

> "was a quiet title suit presenting substantially the same questions as to possession which are now at bar."

In that case, the lower court declined jurisdiction and the Circuit Court of Appeals reversed the decree.

At page 6, same brief, appellees quote from Northern Pac. R. Co. v. Smith, also cited and relied upon by appellants. The paragraph quoted by appellees is preceded by the following:

> "By granting a right of way 400 feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance, and it was not competent for a court, at the suit of a private party, to adjudge that only 25 feet thereof were occupied for railroad purposes in the face of the grant and of the finding that the entire land in dispute was within 200 feet of the track of the railroad as actually constructed, and that the railroad com-

pany was in actual possession thereof by its tenants."

The point which we have been seeking to make upon this appeal is that in the pending suits there has never been any sort of a determination of the question of necessity but that the claim of the defendants is "without right". The question of a forfeiture does not arise in the pending suits.

> "Equitable jurisdiction may be invoked in view of the inadequacy of the legal remedy where the injury is destructive or of a continuous character or irreparable in its nature; and the appropriation of private property to public use, under color of law, but in fact without authority, is such an invasion of private rights as may be assumed to be essentially irremediable, if, indeed, relief may not be awarded *ex debito justitiae.*"
>
> Osborne & Co. v. Missouri Pac. R. Co., 147 U. S. 248; 37 L. ed. 155, 161.

Throughout the briefs of appellees there is a suggestion that the decree in a suit in equity of the character of the pending suits means dispossession of the defendants. If the defendants had permitted the suits to go to trial, appellants' position always has been that, being suits in equity, the decree would be framed to meet whatever condition the evidence might disclose. Appellants have no right, notwithstanding they own the land, to arbitrarily dictate the width of the strip which the main track of the defendant, Southern Pacific Company, shall occupy. Appellants state that appellee, Southern Pacific Company, should be permitted to continue its main track. The form of decree suggested herein later shows appellants' attitude in this regard.

Appellees appear to be under the impression that appellants claim jurisdiction as to the Southern Pacific Company, in possession, by reason of the allegation in the amended bills that the defendant Central Pacific Railway Company is out of possession. It must be apparent to this court that appellants do not so contend, but rely upon the amended bills of complaint showing an inadequate remedy in an action at law against either of the defendants, independently.

The filing of the amended bills and the amendment to the amended bills is not to be construed as a concession that the court on the equity side had no jurisdiction (appellees' first brief p. 11). Upon oral argument it was shown, by reading statements made by the lower court at the time of arguing the motion to transfer to the law side at Sacramento, that complainants insisted that the court in equity had jurisdiction. This fact will be shown also by original assignments of errors 12 to 17; also a reference to the first paragraph of the amendment to the amended bill (Tr. p. 17) shows that the amendment is deliberately directed to the motion for particulars and not to the motion to dismiss and was not made as any sort of an admission of lack of equity in the amended bills. Appellants deemed it their duty to set out as full particulars as to all matters within their knowledge as it was possible for them to set out under the motion of defendants for further and better particulars. Complainants had previously offered to set out as fully as defendants might demand all matters as to complainants' claim of title to the property involved (Tr. top of p. 48).

At page 14, appellees' first brief, and at the same page of their second brief, it is said that complainants "have cited no case in which a bill solely for the quieting of title has been retained against a defendant in possession". Inasmuch as defendants distinguish all cases cited in our opening brief upon the ground that, while they are suits to quiet title, some element existed in them such as an outstanding deed or the loss of a record, or, in a word, that some cloud existed to be removed and the quieting of the title was incidental to removing the particular cloud, we have not been encouraged to look for a case which would satisfy defendants, for we think that none may be found. Where no cloud has existed we think there would be no occasion for a suit to quiet the title. However, the case of United States v. Leslie, 167 Fed. 672, not cited in our opening brief, should satisfy defendants upon the proposition that a defendant's being in possession is in itself no valid ground of objection to jurisdiction in equity.

At page 25 of appellees' first brief it is said that the allegations of the amended bills are equivalent to alleging that the land involved is impressed with a public use and that on this account complainants cannot recover without proof that they have title for and on behalf of the public, etc. The allegations of the amended bills in that regard simply go to show that the land described is highly susceptible of public use by reason of its location and is unusually fitted for public use, so much so that public policy will not demand that the owners of the fee, the proprietors of the land, should be forced to leave the land under the control of a single corporation relying solely upon protection in the name of public

policy. As was stated upon oral argument, the company is protected only to the extent that public policy protects it. If public policy does not demand the company's exclusive control of the property, then every other right in and to the property is in the owners of it.

The holding of land by a public service corporation may create a presumption of right to hold in the corporation but such a presumption is not conclusive and may be overcome by evidence in a suit by an owner of the land. Appellants in the pending suits do not represent any public body, it is true. It is difficult to see how any public body could force issue involving privately owned land, on account of the holding by the Southern Pacific Company, if the owners of the land did not act, and it is equally difficult to see how complainants, being the owners of the land, may not test the right of the company in possession to continue that possession since as owners they are entitled to all the rights which follow ownership and no rights appear herein as outstanding, excepting the right of the public service corporation to hold possession in so far as such corporation can rely upon public policy to protect it. The right to sue follows the ownership, the burden of showing an existing conflicting right is upon the occupant who is holding without title.

The condition described in Northern Pacific R. Co. v. Smith and Stuart v. Union Pac. Ry. Co., shows that public service corporations, railroads, may be in possession and that they may be sued in a suit to quiet the title where flexible, appropriate decrees can be made.

In the Smith case, supra, the company held under a Congressional grant which has been held to be the equivalent of an adjudication of the necessity for the taking. The court will observe that the excerpt from that case at page 6 of appellees' second brief is predicated upon that condition.

Complainants have the right to maintain their suits in equity against defendants in the same manner as they might against any individual who should withhold possession from them without right. The superior right which the defendants have by reason of being public service corporations will be evidenced in the sort of relief given the complainants. If they should show that it would be against the public interest to disturb the Southern Pacific Company's possession, then the decree would be appropriate. It is alleged in the amended bills that the claim of the defendants is without right. As was said in Northern Pac. Ry. Co. v. Smith, land can not be taken,

> "even in the exercise of eminent domain, without compensation",

and this court will not decree the right in appellees to withhold any part of the land without compensation; it will not be done because the Constitution forbids it.

Reference is made at page 26 of appellees' first brief to the recent decision of the California Supreme Court in Gordon v. Cadwalder, 51 Cal. Dec. 328, as holding that

> "there could be no action but one for damages for the taking of the land and applying it to public use without condemnation".

It is not our construction of the decision in that case that it so holds. The action was framed in damages and the necessity of the corporation (S. P. Co.) to hold was not questioned. Other California cases cited by appellees, as we read them, do not sustain, upon the same point, what is claimed by appellees for them. Gurnsey v. Northern California Power Company, 160 Cal. 699, is cited as furnishing the rule in California. That suit was brought in ejectment and no question raised as to the necessary use to which the land taken was devoted by the company. It was the case of an electric transmission line and the facts alleged showed the necessary use just as the allegation of a main line track upon the land involved shows a necessity as to a portion of the land for a continuous service. Likewise in cases where a right of way alone of a railroad company has been involved and the suit has been for possession of the land, plaintiffs claiming the right of possession independent of the question of the necessary extent of the use, it has been held, should sue in damages. Where the use has extended, however, to lands occupied by a corporation which are not "absolutely essential" to a continuance of service, we know of no case in California or elsewhere which holds that an owner of the land may not sue in equity to determine the conflicting rights to the property. If such a case does exist, it is contrary to the rule laid down in Northern Pacific Railroad Company v. Smith, 171 U. S. 260; 43 L. ed. 157, 161, and many other cases cited heretofore by appellants.

Besides, the general jurisdiction of federal courts in equity cannot be abridged by state rules of decision or statutes.

> "By the legislation of Congress and repeated decisions of this Court it has long been settled that the remedies afforded and modes of procedure pursued in the Federal courts, sitting as courts of equity, are not determined by local laws or rules of decision, but by general principles, rules, and uses of equity having uniform operation in those courts wherever sitting. (Citing cases.) As was said in the first of these cases:
>
> > 'Wherever a case in equity may arise and be determined, under the judicial power of the United States, the same principles must be applied to it, and it is for the courts of the United States, and for this court in the last resort, to decide what those principles are, and to apply such of them to each particular case as they may find justly applicable.' "
>
> Guffey v. Smith, 59 L. ed. 864.

The rule insisted upon by appellees, namely, that possession by a public service corporation is conclusive of the right to hold, is plainly against the rights guaranteed by the Constitution. Our point can be shown briefly by illustration: Blank is absent in Europe. A public service corporation is incorporated; is making surveys and constructing its line of railroad; it enters upon and constructs its line over or across the front yard of the suburban home of Blank. The company encloses two hundred feet of Blank's lot, three hundred feet deep in all. A bond issue is placed upon all the right, title and interest of the railroad company in and to its property. Within two years, the company goes into the hands of a receiver. Blank returns and,

according to appellees' contention, he may sue in damages only for the taking of the land; he may not question the extent of the necessary use, however unnecessary the use to the full extent taken may be, or with whatever disregard of the ordinary rights of Blank the taking may have been exercised and notwithstanding he will evidently be unable to realize upon a judgment in damages.

Appellants cannot conceive of such a contention being sustained. It is contrary to sound principle and the reasoning is not such as recognizes the constitutional rights of individuals in dealing with others, even though they may be public service corporations in the exercise of eminent domain.

In the Roberts case the doctrine against ejectment in favor of public service corporations is expressly declared to extend only to land which the company might condemn. If that be the test, how can the mere fact of taking possession be conclusive of the question of necessity in favor of a railroad corporation? All that a corporation would need to do, if the taking were conclusive, would be to allege that the land in its entirety is necessary, whatever its extent might be and what is said in the Roberts case would have no application whatever.

In the Stuart case no claim is made by the railroad company to any portion of the land involved excepting as to a strip four hundred feet wide. About this strip the real controversy turned. If the court took into consideration in that case, in determining jurisdiction, the fact that other lands, to which the railroad corporation

made no claim, were included, all complainants generally would have to do in order to circumvent objection to jurisdiction would be to join other lands with the land occupied by the railroad company. The fact is, jurisdiction was exercised in the Stuart case because, as Judge Van de Vanter said, a complainant has no remedy adequate in law against a railroad company in possession and claiming the right to hold as a public service corporation.

The limitations upon jurisdiction in equity are found in the statutes, and, of course, in the constitutional provision for trial by jury. It is almost idle for appellants to say that in neither statutes nor Constitution is the word "possession" found, as affecting jurisdiction. Appellants are satisfied that there is but the one test of jurisdiction in equity, and that is whether the complainant has a *plain, adequate* and *complete remedy in an action at law* and that if he has not such a remedy, no circumstances as to possession, whether by a public service corporation or by an individual, can deprive him of his right to maintain his cause in equity.

We refuse to turn away from the learning of the past and an acceptance of the purpose of the creation of courts in equity in order that we may get into the exclusive company of appellees when they say at page 16 of their first brief:

> "hence it is not necessarily true that there must be an equitable remedy because there is none at law".

Defendants claim that they did not waive objection to jurisdiction in equity (appellees' first brief page 39). This position is based upon what complainants deem an erroneous view of the law as to what constitutes a waiver. At page 7, same brief, defendants state that

> "there was no joinder in appeal to equitable jurisdiction and hence no waiver of objection to jurisdiction".

It is apparent from appellees' briefs that they rely upon the fact that they

> "do not elect to treat the complaint as one in equity"

and that they

> "have not joined issue in equity"

upon the theory that the defenses made in the answers might be interposed in an action at law. Complainants deem it sufficient to say that the suits were pending in equity and issue was joined there without objection. Complainants elected the forum and defendants did not object.

Defendants assert on page 2 of the same brief that they answered the original complaints

> "but did not seek to have the title of complainants quieted *but* merely alleged possession and *set up some equitable defenses*".

Defendants knew that the suits were pending in equity and that the object of bringing them into court was to determine in equity the rights of the parties in and to the property in controversy. As was said in Converse v. Michigan Dairy Co., 45 Fed. 20:

> "These defendants thereafter knowing as they must have done that the object of bringing them in at all was in order that their claims should be cut off by the decree, and not having raised the objection of multifariousness until now come within the scope of the doctrine repeatedly declared by the Supreme Court that if the matters were of equitable cognizance the objection must be raised in limine and if not then made should not be entertained."

Moreover, it appears at the bottom of page 20 of the transcript that defendants considered their answers as sufficient in equity to constitute a cause of action to quiet title by defendants, at least on October 30, 1914, at a time when to do so served their purpose in the matter then before the court, seven months before they decided to object to jurisdiction in equity or rather before they declared to complainants that they had intention of objecting.

Appellees state in their first brief that appellants did not object to submission of the question of jurisdiction on the motions and refer to a stipulation in the transcript at page 70. It will be recalled that the amended bills contained an allegation of possession by the Southern Pacific Company, that the defendants, upon filing of the amended bills, moved to dismiss; that the complainants, at the hearing of the motions to dismiss, filed an amendment to the amended bills (Tr. p. 17). The stipulation at page 70 of the transcript was given at a time when the motions to dismiss had already been heard, and in the language of counsel for appellees, upon oral argument

> "so that it would not be necessary to make a new motion to transfer, and a new motion to dismiss".

Such was the purpose of the request for, and the giving of the stipulation. As to how strenuously complainants objected to the motions to dismiss can be gathered from that portion of the proceedings before his Honor Judge Van Fleet, read at the oral argument, which in substance is set out in appellants' opening brief at page 81.

In addition to the objections being urged, as is shown in the foregoing, we direct attention to portions of the affidavit of Mr. Wm. H. Devlin—pages 77 to 78 of transcript. There it is shown that complainants ignored the motion to dismiss by moving to have the suits set for trial at the calling of the July calendar, 1915, contemporaneously with the filing of the motions, but that they were opposed by defendants upon the ground, as is shown in the same affidavit,

> "that the cause is not at issue, as no answer to the amended complaint has ever been filed".

The affidavit shows further, that when the trial calendar was called, in November, 1915, the complainants again insisted upon the motions to dismiss being ignored, and that the suits be set for trial (Tr. top of page 78). So far as showing that the complainants did not object to the motions being considered as affecting the status of the suits, the records disclose that they were objecting at every opportunity. It cannot be claimed that the stipulation, referred to, was given for the purpose for which counsel for defendants now seek to use it. The stipulation was given after the hearing on the motions to dismiss the amended bills, as a favor to defendants, for the purpose of saving, as

counsel stated upon oral argument, the unnecessary task of writing new motions, the argument on which had already been heard—and for no other purpose. Defendants were in nowise misled by the stipulation. It will not be permitted that a stipulation, given under such circumstances, may now be construed as a waiver of all the objections which the complainants were consistently urging against the procedure adopted by the defendants. It was becoming of and the professional duty of complainants to give the stipulation that unnecessary expense and encumbering of the record might be avoided.

If this court deems that the circumstances show a willful disregard of any stipulation given by appellants, we are free to confess that appellants consider that they thereby will have taken themselves without the pale of protection of this court. Appellants know of no authority which detracts from the effect of stipulations as announced in Levi v. Evans, 57 Fed. 681, cited and quoted in Pacific Coal and Transportation Company v. Pioneer Mining Co., 205 Fed. 577, and subscribe their full support to the following language used in that case:

> "If additional and amended pleadings, exhibiting causes of action of an equitable nature, could not properly be filed in an action at law, all objection to such course of procedure was expressly waived by the appellant, and he voluntarily appeared to these suits, pursuant to a stipulation entered into by him with the appellees for a valuable consideration. Good faith and fair dealing would now preclude the appellant from profiting by his objection. But, if there had been no waiver, the objection came too late. If a defendant in a suit in equity answers and submits to the jurisdiction of the court, it is too late for him to object

that the plaintiff has a plain and adequate remedy at law. I Daniell, Ch. Pr. (4th Amer. Ed.) p. 555; Reynes v. Dummont, 130 U. S. 395, 9 Sup. Ct. Rep. 486; New Orleans v. Morris, 105 U. S. 600. Good faith and an early assertion of rights are as essential on the part of the defendant as of the complainant. Brown v. Iron Co., 134 U. S. 530; 10 Sup. Ct. Rep. 604."

IF THE DEFENDANTS HAD CARRIED OUT THEIR STIPULATIONS WITH THE COMPLAINANTS, THEY WOULD HAVE COMPLIED WITH NEW EQUITY RULE 32 AND THERE WOULD NEVER HAVE ARISEN THE QUESTION OF DECREES PRO CONFESSO, BUT HAVING SOUGHT DELAY THROUGH DISREGARD OF STIPULATIONS AND THE RULES OF COURT, THEY CANNOT COME NOW AND ASK THAT THEY BE RELIEVED FROM THE CONSEQUENCES OF THEIR CONDUCT.

Complainants exhausted every recourse open to them in their effort to obtain a trial upon the merits. They received stipulations, and unequivocal agreements that defendants would not object to a trial of the suits, as at issue. The court on March 1, 1915 ordered such a trial, yet appellants are here on a decree of dismissal before trial.

Appellants' delay in entering decrees *pro confesso* was due alone to their effort, as appears from the record, to obtain a trial upon the merits. They had decrees *pro confesso* entered only when their last hope of obtaining a trial upon the merits vanished. Appellants ignored the motion to dismiss as affecting the status of the suits as is evidenced by their insistence upon the cases being set for trial at every calling of

the calendar after the motions were filed. Appellants moved, at every possible opportunity, for trial, urging upon the court to order the cases to trial. It was not the duty of appellants to insist upon the making of an order that the answers originally filed stand, but, since the defendants did not move for such an order under Rule 32, it was the right of appellants to do so and such was the apparent purpose of appellants' motions to set the causes for trial. Appellants were not obligated to demand decrees *pro confesso* so long as they might hope for a trial on the merits and we think that this court will encourage the exhaustion of all reasonable means for obtaining a trial upon the merits in preference to decrees *pro confesso* and that complainants' efforts to obtain meritorious trials will not be construed against them as defeating their right to decrees *pro confesso* when all prospect of trial upon the merits was taken from them. Counsel for defendants in oral argument stated the purpose of the stipulation at page 70 of the transcript to be that defendants might be relieved of the necessity of writing new motions. The motion to dismiss had already been heard, as the stipulation shows. The stipulation was given for the purpose stated by counsel and now counsel seeks to construe the stipulation as depriving complainants of every legal right which they urged upon the hearing of the motion to dismiss. Surely this court will not permit that stipulation to be so misapplied. The wording of the stipulation is plain. The purpose of the giving of it comes out of the mouth of the defendants themselves in the foregoing statement of their counsel and it will certainly appear plain to this court that complainants

would not give a stipulation within a week of the hearing of the motion to dismiss, which in effect would waive all the legal objections which they had urged upon the hearing of the motion; the stipulation given means simply that "since you have made your motion to dismiss and the motion has been heard, we shall not insist upon your rewriting your motions, nor upon the record being encumbered with new motions but we are willing that the motion which has been filed shall apply to the amendment which we filed upon the hearing of the motion".

The record shows that the amendment was filed at the time of hearing of the motions and in response to the motions for further and better particulars and not as an admission of any weakness in the amended bills whatever (see first paragraph of amendment, Tr. p. 17).

Complainants ignored the motions to dismiss as far as possible, and urged upon the court the setting of the causes for trial upon the theory that the court could order under Rule 32 the answers to stand, since no new answers were in. The court refused to set the causes for trial—or to consider the original answers as standing. Defendants had contended for the ruling which the court made. It consequently appears plain that both the court and counsel for defendants looked upon the answers originally filed as no longer a part of the records. Complainants thereupon—after the court's opinion showing that the court did not consider the answers in the record for any purpose—had the right to accept defendants' view and the court's view.

There being no answers in the record at all, and the court refusing to order the original answers to stand, complainants were entitled under Rule 32 to their decrees *pro confesso*.

Moreover, they were entitled at all times to such decrees under the rules because it was the duty of the defendants to obtain an order from the court that the original answers should stand as the answers to the amended bills if they wished the original answers so to stand. It is apparent, however, that the defendants did not so wish but wished to object upon the ground that the amended bills did not state facts sufficient to constitute valid causes of action in equity, for the reason that they disclosed a remedy at law, namely, in damages. The right to so object did not exist in the defendants at that time.

Sanction given to the conduct of the defendants as evidenced by the record in the pending cases will not be inspiring to sympathy with the spirit of the new rules in equity. That conduct is contrary, as we think, to every intendment of those rules. It is violative of every thought and effort of the profession to better old conditions which made possible such delays as the complainants in these cases have suffered and which led to the adoption of the new equity rules. If such disregard of the rules and of stipulations should receive the sanction of appellate courts, what efficacy is there in the rules and how can the profession take encourage-

ment for the fulfillment of the promise of speedy determination of causes which the new procedure adopted by the new rules holds out? Experienced counsel for defendants cannot claim ignorance of the rules any more than of the effect of the stipulations given.

We could not be easily convinced that counsel for defendants do not know that, in view of the authorities, the amended bills of complaint in these suits contain facts sufficient to constitute valid causes of action in equity; that, by answering to the merits, defendants submitted to jurisdiction; that a court in equity should have compelled them to comply with their stipulations.

There is no escaping the conclusion that the successive steps were designedly taken by the defendants at a time when longest delay would be assured. Note the lapse of time before the filing of the notice of motion to transfer at Sacramento. The motion was noticed for hearing on the day set for trial, notwithstanding months had intervened since the suits were brought to issue.

Except for denial of complainants' rights to trial, the cases would now be here after trial on the merits.

Many reasons exist why the defendants should not wish to try the suits upon their merits. The record discloses possession in the defendant Southern Pacific Company and a clear lack of title, as will be later summarized.

If defendants can knowingly make "mistakes of law" and may take the advantage of delays occasioned thereby in the face of certain reversal with the chance of a reversal that merely remands the cases, the whole

purpose of the new equity rules, in speeding causes and eliminating delay, will be defeated.

Appellants submit their claim to have the wrongs which they have suffered effectually rectified by final decrees.

FINAL DECREES WILL NOT DEPRIVE DEFENDANTS OF ANY SUBSTANTIAL RIGHT.

The record now shows that the holding of the defendant companies as claimed by them, at all times has been limited to an estate for years, expiring on the 28th day of June, 1911.

It is alleged in the answers that the Central Pacific Railroad Company of California was a corporation organized under the laws of the State of California, and that it entered upon the property described in the bills of complaint in the year 1863. It was admitted at the oral argument that said Central Pacific Railroad Company of California was organized on the 28th day of June 1861, to exist for a term of fifty years. By reference to the California Statutes of 1861 it will be seen that the rights of the Central Pacific Railroad Company of California and its successors in interest, in and to the property, terminated on the 28th day of June, 1911. Said section will be presently quoted.

In the opening brief (pages 62 et seq.) appellants argue that it cannot be the law that, where a railroad company enters upon land under conditions which fix a limitation of time upon the right of the company to hold, a party owning through mesne conveyances from the

original owner has not the same right to proceed upon arrival of the time limitation as the owner had at the time of the original entry.

Since the hearing in this matter upon oral argument, appellants' position in that regard has been confirmed in a case reported in 22 Cal. App. Dec. 668, E. San Mateo Land Company v. Southern Pacific Railroad Company, the first head note of which is as follows:

> "A deed reciting that for and in consideration of encouraging and promoting the construction of a railroad, and for other considerations, the grantor conveyed the land therein described to a railroad company and its successors 'during the legal existence of said company, solely upon the following conditions (here follow certain conditions) * * *; and upon the breach * * * of any of the aforesaid conditions, this grant shall become void, and the estate thereby conveyed * * * shall cease and determine, and the said land shall absolutely revert to the party of the first part (grantor) his heirs or assigns in the fee simple * * * and shall in like manner at the expiration of the legal existence of said company revert to said party of the first part, his heirs or assigns, notwithstanding anything herein contained to the contrary,' does not show an intention of the grantor to irrevocably dedicate the land to railroad use upon a condition subsequent, but shows an intention to limit the duration of the grant to the period of legal existence of the company."

The provisions incorporated in the deed under consideration in the foregoing case, in the view of appellants, must be read into the rights of the Central Pacific Railroad Company of California and its successors in interest in and to the land described in the amended bills of complaint herein by reason of the fol-

lowing provision of the statute under which said railroad company was incorporated:

> "Any railroad company, organized under the provisions of this act, or any railroad company now organized under any law of this State, which shall accept the provisions of this act, as herein provided, is hereby authorized to enter upon any land for the purpose of surveying the line of its proposed railroad, the company being responsible for any damage occasioned by such entry; and such company is also authorized to acquire, purchase, and hold, any real estate, or any right, title, or interest, therein, which may be necessary, or proper, for the purpose of the construction, or maintenance, of the track, or tracks, water-stations, depots, machine, or work shops, turn-tables, or any other building, or structure, necessary for such railroad; but such company shall not hold such real estate, or any right, title, or interest, therein, acquired, or used solely, or mainly, for the construction, or maintenance of the track, or tracks, of said railroad, beyond the time of the legal existence of said company, nor after the location of said track, or tracks, has been changed therefrom, nor after the said company shall have failed, or ceased, to use the same, for the maintenance of such track, for the space of five years continuously; but in each of such cases, the said real estate, and all the right, title, and interest, therein, shall revert to the person or persons, and his, or their, assigns, from whom the same was acquired by said company." Cal. Statutes 1861, p. 618, in effect May 20, 1861.

The statute is no doubt referable to the fifty year limitation on the term of existence of corporations as fixed by the State Constitution.

Appellants did not institute the pending suits, however, in reliance upon the foregoing quoted statute; yet, it appears to them that, in the absence of other

ground, they would be entitled to rely upon said statute.

Whether appellees had in mind the foregoing statute when the amended answer was filed in which it was alleged that the entry of the Central Pacific Railroad Company of California was "under, by and with the consent of the predecessors in interest of plaintiff" (Tr. p. 99), the record does not disclose, nor does it disclose whether appellees had such statute in mind when, though under order of court to set out under what instrument, if any, said Central Pacific Railroad Company of California and its successors in interest, including the present defendants, have held possession of said property, they failed to set out, in their supposed compliance with said order, any instrument at all. Their failure to set out any instrument in complying with the order of court can be given but one proper construction and that is that they set out their strongest claim to the property and in the face of the claim set out and of the foregoing statute, they bring themselves under the rule laid down in Klenk v. Bryn, 143 Fed. 1010, where it is said that

> "General denials which are inconsistent with facts affirmatively alleged are not entitled to consideration."

The foregoing case involved questions of title where matters affirmatively appeared in the pleading which negatived a general allegation of ownership.

The pleadings taken together with the whole record now before this court show that upon the merits of the

controversy, independent of other considerations herein urged, appellants are entitled to final decrees and they petition this court for such, upon the record, pleadings and admissions given and made.

At the oral argument counsel for appellees said of appellants' failure to amend and their election to stand upon their amended bills that "they have had their day in court; it is all over upon the merits". Appellants admit that if the decree should be affirmed it is "all over" with them in equity for they made their election.

Appellants take a like position with reference to appellees and say that the defendants elected to stand upon the insufficiency of the amended bills in equity and to not file a new or supplemental answer to the amended bills as provided by Rule 32. Appellants say that if they have had their day in court so have the defendants and that if the amended bills do state good causes of action in equity or if defendants waived the right to object to jurisdiction in equity, then defendants are in default and "it is all over".

Both sides have made their election and stand upon the correctness of their positions in law. They submit the matter as to in whose favor the decrees shall be made herein.

Appellees nowhere question the authorities in appellants' opening brief at pages 128-143, but stand upon lack of jurisdiction over the suits, and there consequently being no default. Appellees do not deny but that this court should make final decrees if the orders

for decrees *pro confesso* were erroneously set aside. If there be jurisdiction or waiver, there must be a default under Rule 32.

THIS COURT IN EQUITY CAN AND WILL MAKE DECREES WHICH WILL GIVE APPROPRIATE RELIEF.

Appellants deem it not out of place, however, to set out an idea as to the sort of decrees which the court may make. Appellants are entitled to final decrees in law and no ground exists in law or equity why decrees herein should not be final, particularly since the record discloses, viewed from the pleadings, admissions and conduct of the defendants, that the defendants have in themselves no substantial rights in the property involved. Ordinarily, a decree, quieting the title to the whole property and an order for a writ of possession as to the whole of the property, would follow, in order that the whole controversy may be disposed of in these suits. Such was the purpose of Section 738, Cal. Code of Civil Procedure; in Landregan v. Peppin, 94 Cal. 466, it is stated

> "He (the plaintiff) has the right to secure all the relief in one action and this was the sole object of the provision."

Such, too, has been the uniform policy of the federal courts in equity, authorities to which point are given in appellants' opening brief. There is, however, upon a portion of the property involved a railroad main track, used by the Southern Pacific Company, defendant. Appellants are of the opinion that, notwithstanding the record, appellees should be permitted to condemn an

easement of necessary width for operation of their main line over the land, and that this court should grant to them a reasonable time within which to make arrangements with complainants for a strip of land of that character or to proceed in condemnation for that purpose.

In Richards v. Buffalo et al., R. R. Co., 137 Pa. St. 534, cited in appellants' opening brief, page 71, and concluding at the top of page 73, it was ordered that execution be stayed for four months, in order that defendant might proceed to condemn and acquire a right of way according to law.

Beyond these suggestions appellants will not suggest as to the form of decree, but, they do wish to call the attention of the court to the fact that the pending suits were instituted in the summer of 1914, and that defendants are in possession of this valuable property and by dilatory means have succeeded in keeping themselves in possession for almost two years; if the allegation of the answers be taken as true and construed with the whole record, including all admissions given and made, the rights of defendants to hold expired in 1913. Surely, the fact that the suits are before this court, without complainants having had a trial, cannot be attributed to any lack of diligence in pressing for a trial by complainants. Appellants petition of this court as speedy and as full relief as this court can give; they have been grievously wronged, and their hope of speedy relief is in decrees in this court and not in a remanding of the suits. *They submit the record as to whether they have reason to earnestly petition this court for final decrees.*

STATEMENTS MADE UPON ORAL ARGUMENT WHICH APPELLANTS WISH THIS COURT TO HAVE IN MIND.

COUNSEL FOR APPELLEES.

First.

> "Now with this motion before the Court we pleaded that the complaint with the amendment added did not state a valid cause in equity. Why? For the reason that the property now appeared to to be in the possession of the Southern Pacific Company—all of it. Such was the averment. If that be the case, then the property was not unoccupied and waste and uncultivated and therefore no valid cause of equity could be set up against the Central Pacific Railway Company, one of the defendants. Again, if the property is in the possession of the defendant then there is a complete bar in equity to an action to quiet title upon the equity side because then the remedy is upon the law side if the complainant claims to be an owner of the property and the defendant is in possession as alleged in this bill."

Second.

After setting out appellees' view of the remedy open to owners who have permitted their land to be taken by a railroad, Mr. Devlin said:

> "And his only remedy is to sue in damages and that belongs to the owner of the property at the time of the taking and it does not belong to the owner of the property subsequently. Now that is the rule and there is no question about it. The authorities in Judge Van Fleet's Opinion hold so."

(Since the argument, the District Court of Appeal of California has held otherwise in East San Mateo Land Co. v. S. P. Co., heretofore cited in this brief.)

Third.

"As we understand the law, the amended complaint was filed by counsel for complainant in response to a suggestion by the Court that such an amended bill was proper; the complainant having complied, that necessarily waived everything that occurred before that time. There is not any answer to the amended bill because we have not got to that point as yet."

(A clear showing of violation of Equity Rule 32.)

"But the action could be transferred to the law side and it ought to appear that the complaint stated an action at law."

(The court will readily see that in a suit to quiet title, a complainant would make no attempt to state an action at law in damages, though the bill might clearly show a justiciable cause.)

By Counsel for Appellants.

First.

"Now that your Honors may get the chain, alleged in part, to title of the defendants we start with the old Central Pacific Railroad Company of California, and if I am not correct, counsel will correct me. That corporation was organized under the laws of the State of California, June 28, 1861 for a term of fifty years, to exist. The Central Pacific Railroad Company of California was later consolidated with the Central Pacific Railroad Company, leaving off the 'of California'. That corporation was organized in August, 1870 for fifty years and the rights of the last named corporation have passed to the present day Central Pacific Railway Company, a Utah corporation."

Second.

> "I represented all of the complainants in the suits below and Mr. Devlin, Devlin & Devlin and Mr. Foulds' office represented the defendants."

Third.

> "The defenses set up are identical in all of the answers. Our time to appeal will expire in June and we would like to know the action of the court that we can take proper action regarding the other cases.
>
> Judge GILBERT. You have no stipulation that the decisions in the other cases shall abide by the decision in this case.
>
> Mr. WHITE. I have received none. I have an order of the court below of consolidation for the purpose of appeal, but I have no stipulation."

CONSOLIDATION.

It is said in appellees' last brief that

> "It was practically conceded on oral argument that the attempted consolidation was abortive."

The foregoing quotation (third) from the oral argument shows what was said in that connection. Appellants will, if this court finds it inconvenient to decide this appeal before June 3, 1916, file in the clerk's office of this court a transcript of the proceedings in each of the fifteen remaining suits, however costly and laborious the task. This will be done as was said by the United States Supreme Court in United States v. Baltimore etc., 220 U. S. 94; 55 L. ed. 385, cited in appellants' opening brief at page 146,

> "out of abundant caution".

Appellants have faith, however, in the sufficiency of the authorities cited in their opening brief, pages 144-150, as warranting this court in passing upon all the cases upon this record, particularly in view of the following admitted condition:

> "There are in addition to the above entitled suit, fifteen similar suits and there are similar decrees in each of said cases" (appellees' first brief page 1).

The trial court granted a consolidation of the fifteen other cases with the case by which this appeal is entitled (appellees' first brief page 42); and in the opinion of the trial court it is said, at page 25 of transcript, that the several actions are of a *precisely similar character,* and as is said in appellants' opening brief, page 2

> "The defendants answered the original bills and set up precisely the same defenses in all of the suits."

It appears from the record that various papers filed in one suit were made applicable to all suits alike, as was done, for instance, in the case of the opinion of the court below. Counsel for both sides have remained the same throughout the proceedings in all suits and the record shows that many papers filed in one suit, were made applicable to all; in the praecipes of both parties, upon this appeal, papers from the files of the different suits were designated. The similarity of pleadings and of the general character of the suits and questions involved were admitted upon oral argument.

The order of consolidation appears to appellants to have been proper since the condition of the record was clearly within the scope of cases contemplated by Re-

vised Statute Section 921, providing for the consolidation of causes of a like nature or relative to the same question for the purpose of saving expense to the parties and the time of the court.

A stipulation of parties, it seems to appellants, would only clear the way for an order of court. By the order of consolidation, so much of the life of each case was imparted into the principal case that subsequent proceedings affecting the principal case carry with them all cases affected by the order of consolidation.

Appellants submit the effect of the order of consolidation upon the authorities cited in their opening brief, pages 144-150, and pray for such and as full relief as this court may deem them entitled.

Dated, San Francisco,
April 24, 1916.

Respectfully submitted,

BURRELL G. WHITE,
Attorney and Solicitor
for Appellants and Complainants.

EDWARD ELLIOTT,
ROY S. BARTLETT,
Of Counsel.